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Supreme Court, U.S.
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No. 05-1648

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICI BRIEF

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AS THE COURT IS CONSIDERING OF PETITION FOR A WRIT OF CERTIORARI

NOW COME *Amici* in support of Petitioner, MARSHALL SPIEGEL, by Chicago Board of Trade ("CBOT") exercising member and Chicago Board Options Exchange ("CBOE") member and floor trader, THOMAS A. BOND, and CBOE treasury seatholder, DONALD R. CLEVEN, by their attorney Kenneth L. Gillis, pursuant to United States Supreme Court Rule 37, and move this Honorable Court for leave to file an *Amicus Curiae* Brief in support of the Petitioner's Petition for Writ of Certiorari and in support state:

1. Respondent, SECURITIES AND EXCHANGE COMMISSION ("SEC"), through the Solicitor General of the United States, Paul D. Clement, while being informed has - neither consented nor refused consent to the submission of this *Amicus Curiae* brief in support of the Petitioner's position. However, Petitioner has provided his consent.

2. Petitioner along with members of the *Amici* were commentators to the underlying rulemaking proceedings before Respondent, SEC.

3. The United States Court of Appeals for the D.C. Circuit had dismissed Petitioner's appeals on the grounds that as a result of the sale of his CBOE membership, he lacked standing to pursue his appeal which was deemed moot (Petitioner's Appendix at 1a) ignoring *the public interest exception to the mootness doctrine* or - by analogy - that even after property

holders are evicted they may pursue claims for damages.

4. As shown in Petitioner's Appendix at 10a *Amicus*, Thomas A. Bond, while acting as commentator had attempted to present to Respondent, SEC, a June 3, 2005 legal opinion showing how CBOE's board and SEC were misguided in relying on the legal opinion provided by CBOE's Delaware counsel. That is the centerpiece in the SEC's decision making that led to this appeal.

5. In Petitioner's appendix 93a, footnote 15 of the SEC Release No. 34-51733 (70 FR 30981) Respondent SEC states, "On May 18, 2005, the CBOE consented to an extension of time until June 10, 2005 for the Commission to consider the filing."

6. As a result of the SEC refusal to consider the June 3, 2005 legal opinion, Petitioner and his fellow commentators were prevented from rebutting a pivotal issue that the SEC had relied on in its rulemaking process.

7. *Amici* are representatives of classes of current members of CBOT who are holders of the exercise right that permits access to CBOE as full members as described at Petitioner's Appendix 111a and CBOE treasury seatholders who have an ongoing stake in the outcome of this unique controversy that will "be capable of repetition yet evading review" as litigation on the issues raised by Petitioner loom between CBOT and CBOE.

8. *Amici* are especially concerned that should the SEC decisions be upheld, it would severely diminish the ability of many minority members, both CBOT exercising members and CBOE treasury seatholders, to address controversies of corporate governance on all levels including current issues between CBOT and CBOE concerning the exercise right. This would have a negative impact on the ability of CBOE to effectively represent their constituencies interests in future controversies with CBOT over issues concerning the CBOE exercise right, as CBOE has announced that it is threshold of filing with Respondent, SEC, its intent to become a publicly traded shareholder corporation in the third quarter of this year.

9. *Amici* are concerned that the SEC has approved CBOEs' rules - not using due process of law that prevents CBOE members from suing the CBOE to protect their member interests.

Respectfully submitted,
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STATEMENT OF INTEREST OF THE *AMICI*

This *amicus* brief is filed on behalf of individuals who are representative of two distinct categories of CBOE members, collectively identified as CBOT *exercisers* and CBOE *treasury seatholders*, pursuant to Rule 37 of this Court.[1] The individuals *amici* are a diverse group of commentators in the underlying SEC rulemaking proceedings who were Vice-Chairmen and members of CBOE's Board of Governors, are currently CBOT exercisers and CBOE members and treasury seatholders who are committed to the principals of fair and effective governance for all members of CBOE.

The *Amici*, Mr. Bond and Mr. Cleven, while they have quite divergent interests on a wide range of issues relating to CBOE governance, and the SEC rulemaking process they agree the Court of Appeals for the D.C. Circuit erroneously dismissed an issue that will *be capable of repetition yet evading review.*

However, they share one common view, which prompts their involvement in this brief: the *Amici* believe that the SEC and D.C. Circuit Court of Appeals decisions in these matters failed to give appropriate consideration to the fundamental right of a parties to be fully heard by the agency in the rulemaking process under the Administrative Procedure Act (APA) and Petitioner's right to be heard pursuant to this Court's rulings that he is entitled to prosecute his appeal not

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1 Pursuant to Supreme Court Rule 37, pro se authors for *Amicus Curiae*, Thomas A. Bond and Donald Cleven state with the assistance of counsel, that they have authored this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of this brief.

only because he has a stake in the outcome, but under his right as a commentator, under the a public interest exception to the mootness doctrine.

Amici believe that their perspective will complement that of the Petitioner and will provide assistance to this Court in deciding the issues.[2]

STATEMENT

Amici and Petitioner were commentators in the underlying rulemaking proceedings that resulted in Petitioner filing petitions for review of the SEC orders dated February 25, 2005, SR-CBOE-2004-16, SEC Release No. 34-5152 [3] and May 24, 2005 in SR-CBOE-2005-19, SEC Release No. 34-51733[4] in the United States Court of Appeal for the D.C. Circuit Case Nos. 05-1211 consolidated with 05-1279, respectively.

The Court of Appeals for the D.C. Circuit dismissed those appeals on the judicial doctrines of standing and mootness because Petitioner sold his CBOE treasury membership on concerns that it would not sustain value after the underlying SEC proceedings had concluded.

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2 Respondent, SEC, while they have been informed, has neither consented or disapproved, the filing of this brief. Petitioner has provided his consent.

3 70 FR 10442

4 470 FR 30981

ARGUMENT

THE SEC HAD FILED TO ADHERE TO ITS PROCEDURES IN DECIDING PETITIONER'S PETITION FOR REVIEW BEFORE THE COMMISSION WITHOUT PROPERLY HEARING HIS EVIDENCE

The Securities and Exchange Commission failed to deal with Petitioner's points as to whether the SEC or a State Court Judge should decide issues of corporate governance.

The Court of Appeals for the D.C. Circuit had not addressed whether Section 25(a)(1) of the Exchange Act confers the right of an "aggrieved party" to show economic harm as the only exclusive element to have standing to appeal. When Congress said in the statute that an "aggrieved party" had standing to appeal, in this case Petitioner has claimed *economic harm* to himself.

With regard to the statutory component of standing, the Administrative Procedure Act (APA) entitles a party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review.[5] Section 25 of the Securities Act of 1934 entitles a person who is "aggrieved by a final order of the Commission [SEC]. . . [to] obtain review of the order."[6]

Petitioner should be entitled to review by a State Court instead of allowing the SEC to deal with

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5 5 U.S.C. Sec. 702 (2005).
6 15 U.S.C. Sec 78 (2005).

Corporate State Law.

There is an exception to the *mootness doctrine* if (1) the question must be of a public nature; (2) an authoritative determination of the question must be desirable for the purpose of guiding public officers; and (3) the question must likely to recur. These elements were demonstrated in *Dyer v. Securities and Exchange Commission*, 266 F.2d 33, at 47 (1959), and many other cases.

Petitioner's circumstances that support a finding of standing sufficient to meet Constitutional concerns over justiciablility are, that the harm involved is not unique to Petitioner as he asserts the interests that others, including the interests that others like the *Amici* share (*i.e.*, other CBOE members and CBOT exercise members also opposed the CBOE rule change before the SEC on the same grounds as Petitioner), Petitioner has consistently challenged the CBOE rule from the outset, and has repeatedly stated in the underlying proceedings his interest in potentially acquiring an interest in another CBOE treasury membership.

This Court has viewed mootness as the "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)'"[7] However, even though some issues may become moot during the pendency of a case,

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7*United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Monaghan, "Constitutional Adjudication: The Who and When" 82 Yale L.J. 1363, 1384 (1973)).

the case will survive as to any issues that are not moot. Thus, "[o]ften a claim for damages will keep a case from becoming moot where equitable relief no longer forms a basis of a live controversy." Exceptions to mootness have been applied where (1) an issue is a recurring one, which nonetheless evades ordinary review; (2) a plaintiff whose claim is moot may continue a suit as representative of a broad class of individuals with a continuing interest; (3) a plaintiff's claim has been mooted only because defendant has voluntarily, but not necessarily permanently, acquiesced, (4) a case appears to be moot only because collateral consequences of challenged action have been ignored.[8]

It is important for this Court to remember, even though the underlying controversy between CBOE and CBOT on the exercise right issue will arise again that . . . . the issue of the SEC validating the *ultra vires* action of CBOE's Board to revise its Articles of Incorporation will have a binding effect on future Board decisions to revise its Articles of Incorporation may be considered precedent. Thus, even CBOT exercisers will find themselves disenfranchised when CBOE strips away their rights to trade at CBOE with its upcoming demutualization (conversion from a membership organization to a publicly held and traded shareholder corporation).

Amici believe that Petitioner's statutory right to

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[8]Tribe, *id* at p.347 *citing Powell v. McCormack*, 395 U.S. 486, 497 (1969) (Congressman's injunctive demand to be seated as a member of the 90th Congress became moot with termination of that Congress and his seating in the 91st Congress; he was allowed to continue his suit, on his claim for back salary).

judicial review pursuant to Section 25(a)(1) of the Exchange Act should not be conditioned exclusively on demonstrating his personal financial harm as another element for why he has standing to appeal. Members of the public have the right to comment and participate in hearings pursuant to the APA; at a time when Petitioner's and *Amici* shared that right.

Amici believe, as part of their ability to participate in commenting on issues, that affect the *public interest* and free speech rights, Petitioner should have standing to continue with his appeal from the D.C. Circuit Court of Appeals. This should be part of Petitioner's right to raise issues concerning the public interest and free speech rights afforded all members of the public pursuant to APA.

Beyond the private action brought by Petitioner, during whose tenure at CBOE saw them expend approximately $4,000,000 on purchase of CBOT exercise rights. As a result of SEC rule approvals Petitioner saw the value of his seat plummet because CBOE's board insured that 1,300 additional CBOT members will be participating in a demutualization plan. Petitioner was trying to limit this to 935 of his fellow CBOE treasury seatholders, a claim that he and his fellow current members may be barred from asserting as a result of the D.C. Circuit Court of Appeals erroneous rulings. Thus having a significant impact on the public interest. It raises issues of corporate governance in a publicly regulated corporation that is a key component to the global equity markets consistent with Delaware Law.

As more corporations demutualize like CBOE, in a global market place, maintaining corporate democracy is one of the key functions the SEC is charged with by expressly considering the issues or mandate a State Court to hear the controversy. This is necessary to maintain the integrity of the globally traded markets of the United States and publicly traded corporations.

CONCLUSION

For the foregoing reasons the Petitioner's petition for writ of certiorari should be granted.

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Press Releases
⊟ CBOE & CFE Press Releases

FOR IMMEDIATE RELEASE

CBOE BOARD UNANIMOUSLY APPROVES FILING TO DEMUTUALIZE; CBOE REPORTS EARNINGS FOR FIRST SIX MONTHS OF 2006

Chicago and New York, July 27, 2006 - The Chicago Board Options Exchange announced today that its Board of Directors unanimously authorized the filing of an S-4 Registration Statement with the Securities and Exchange Commission (SEC). The filing of the S-4 is a key step in CBOE's demutualization process, which will result in the conversion of CBOE from a membership organization to a wholly owned subsidiary of a new holding company, CBOE Holdings, Inc. CBOE expects to submit the filing to the SEC in the coming weeks. CBOE's proposed restructuring must be approved by the SEC and by a vote of the CBOE membership.

CBOE is currently a mutually-owned membership organization. In its demutualization, memberships will be converted into shares of the new company. The conversion of memberships to shares also provides CBOE Holdings, Inc. with the ability to pursue an IPO, should it decide to become a publicly traded company.

In anticipation of its eventual demutualization, CBOE began its transition to a for-profit corporation in January 2006. The Exchange streamlined its 2006 operating budget and reconstituted the composition and functions of its governance and advisory

committees to reflect those of a for-profit enterprise. For the first six months of 2006, CBOE reported revenues of $129.6 million, versus $98.2 million for the same time period last year; income before taxes of $32.0 million, versus $8.7 million last year; and retained earnings of $139.2 million, versus $114.3 million a year ago.

"The willingness to change has enabled CBOE to continue to lead an industry vastly different than the one it launched 33 years ago. Our for-profit transition has enabled CBOE to operate more efficiently, and this next step will further increase CBOE's autonomy and agility. Demutualization provides the "strategic optionality" necessary to chart the course for years to come. The conversion of seats to shares allows us to deal in the same currency as our competitors and potential partners at a time when the marketplace embraces the new structure," said William J. Brodsky, CBOE Chairman and CEO.

CBOE, the world's largest options marketplace and the creator of listed options, is regulated by the Securities and Exchange Commission (SEC). For additional information about the CBOE and its products, visit the CBOE website at: http://www.cboe.com/

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